LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 27 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71 - 582

LAURENCE H. FROMMHAGEN, *Petitioner,*

vs.

J. HENRY GLAZER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

DAVID B. GOLD,
HERBERT W. YANOWITZ,
105 Montgomery Street, Suite 1100,
San Francisco, California 94104,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of the case	3
Reasons for granting the writ	5
I. The decision below conflicts with a decision of this court	5
II. The decision below conflicts with the analysis in a decision of the court of claims	7
III. The decision below conflicts with a decision of another court of appeals	9
Conclusion	9

Table of Authorities Cited

Cases	Pages
Barr v. Matteo, 360 U.S. 564 (1959)	5, 6
Gregoire v. Biddle, 177 F. 2d 569 (2d Cir. 1949)	6
Morgan v. Willingham, 424 F. 2d 200 (10th Cir. 1970)	7, 9
Muskopf v. Corning Hosp. Dist., 55 C. 2d 211, 11 Cal. Rptr. 89 (1961)	5
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	8
Pollier v. Columbia Broadcasting System, 368 U.S. 464 (1962)	8
Santos v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944)	8
Swaaley v. United States, 376 F. 2d 857	8
White Motor Co. v. United States, 372 U.S. 253 (1963)	8
Willingham v. Morgan, 395 U.S. 402 (1969)	7

Rules	
Federal Rules of Civil Procedure, Rule 56	9

Statutes	
28 United States Code:	
Section 1254(1)	2
Section 1442(a)(1)	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

LAURENCE H. FROMMHAGEN, *Petitioner,*
vs.
J. HENRY GLAZER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Laurence H. Frommhagen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 27, 1971. A timely petition for a rehearing was denied on June 8, 1971, to be made effective June 15, 1971.

OPINIONS BELOW

No opinion of the District Court for the Northern District of California was rendered.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 441 F. 2d 338 (1971), and a copy thereof is attached as the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1971, and an order denying a petition for rehearing was entered on June 8, 1971, to be made effective on June 15, 1971. This Petition was not filed within ninety days of said dates by reason of intentional default on the part of petitioner's then attorney. By Orders dated September 27, 1971, and October 14, 1971, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, granted extensions of time in which to file this petition until October 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the question whether the chief counsel of the NASA-Ames Research Center was acting within the outer perimeter of his duties when he sent copies of a defamatory letter directed to an Ames employee to various NASA officers when the employee was not in the chief counsel's line of supervision raise a triable issue precluding the granting of summary judgment?

2. Is a communication from the chief counsel of the NASA-Ames Research Center directed to a fellow employee of Ames complaining about alleged defamation, a personal grievance, which would be subject only to a qualified privilege that could be defeated by a showing of malice?

3. When a governmental official must establish (a) that his conduct in sending a defamatory com-

munication was within the outer perimeter of his duties and/or (b) that the defamatory communication was not actuated by malice, can summary judgment be granted upon mere conclusory allegations in affidavits that the official was acting in the scope of his official duties?

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment and opinion of the Court of Appeals, which affirmed the granting of summary judgment against the petitioner.

This is an action for damages for libel which originally was filed in the Superior Court of the State of California for the County of Santa Clara and was removed to the District Court for the Northern District of California by respondent. Petitioner was a research scientist at Ames Research Center, National Aeronautics and Space Administration (NASA); Respondent was Chief Counsel at that installation. Petitioner, as conceded in the opinion by the Court of Appeals, was not in respondent's line of supervision.

During January 1968, hearings were held in a grievance proceeding on charges filed by petitioner against respondent and four other officials at Ames Research Center. On March 22, 1968, petitioner sent a letter to the General Council of NASA in Washington, D.C., in which he asked for advice on what to do

about respondent's actions with respect to the grievance action. On March 28, 1968, respondent sent petitioner a memorandum demanding a retraction of statements made in petitioner's March 22, 1968 letter to the General Counsel. Petitioner, in a March 29, 1968, memorandum, refused to acknowledge that he had accused respondent of perjury. On April 1, 1971, respondent responded with a document in which he stated in part:

> You were given an opportunity—more in the nature of a 'sporting chance'—to retract your libelous statements, but I can only gather from the responses in your memorandum of 29 March that *you are either too arrogant or too stupid* to really understand what you have done. . . .
>
> Hopefully you will spare me from further memoranda even though *they have been a source of unbridled enjoyment in my office.* But in the face of the Vietnam War, the attack upon the dollar, the riots in the cities, and the NASA budget cuts, *it is simply immoral,* in this time of crises, Dr. Frommhagen, for any civil servant *to sit idly at his desk and unduly amuse himself by unraveling the leitmotif surrounding a certain ego-centered hero who appears, and reappears, in your writings.* I am truly sorry for you.... (Emphasis added)

A copy of this letter was sent to the Chief of the Personnel Division of the NASA installation and blind copies were sent to three other NASA officials. Petitioner's action for libel was based on the excerpted portion set forth above of respondent's communication to petitioner of April 1, 1968.

On April 10, 1968, respondent in a lengthy memorandum to the Chief of the Personnel Division, formally invoked the federal grievance procedure against petitioner, but declined some weeks later to pursue this grievance.

The Director of Ames Research Center, in a memorandum to petitioner dated May 15, 1968, stated:

> Ames management was not involved with authorizing or sanctioning [respondent's] letter to you dated April 1. This is [respondent's] prerogative. . . .

The district judge found that respondent acted under color of federal office in writing and circulating the letter and was therefore immune from personal liability. The Court of Appeals for the Ninth Circuit affirmed on the authority of *Barr v. Matteo,* 360 U.S. 564 (1959) and stated in its opinion that the instant case was stronger than *Barr v. Matteo, supra,* in that the publication here was limited to four officials of NASA.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT

During the past decade, few, if any, established citadels of the law have been subjected to more persistent and successful onslaught than the doctrine of sovereign immunity. See e.g., *Muskopf v. Corning Hosp. Dist.,* 55 C. 2d 211, 11 Cal. Rptr. 89 (1961). Thus, in determining the proper application of the decision of this Court in *Barr v. Matteo,* 360 U.S.

564 (1959), this Court should consider the tendency on the part of various courts throughout the country to increase the liability of governmental agencies and officials for their tortious conduct.

It is submitted that the decision of the Court of Appeals in affirming the granting of summary judgment in this case does not conform with a proper reading of the *Barr* decision. In *Barr* this Court concluded that defamation is privileged only if the "action . . . taken was within the outer perimeter of [the governmental official's] line of duty . . . ." *Barr v. Matteo,* 360 U.S. 564, 575 (1959). For as elsewhere stated by this Court in its opinion, relying upon the language of Judge Learned Hand in *Gregoire v. Biddle,* 177 F. 2d 569, 581 (2d Cir. 1949):

> '[W]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .'

Both the district judge and the Court of Appeals ruled that the defamatory communication was absolutely privileged because the respondent "acted under color of federal office in writing and circulating the memorandum."

It is submitted that there can be a material distinction between conduct "within the outer perimeter of [a governmental official's] line of duty" and conduct "under color of federal office," and that conduct under color of office may be outside the outer perimeter of duty.

The phrase "color of office" has a defined meaning broader than and different from the scope of official powers. In *Willingham v. Morgan,* 395 U.S. 402, 405 (1969), this Court concluded that the phrase "color of office" for the purposes of removal under 28 U.S.C. §1442(a)(1) was broader than the test for official immunity. And on remand the Court of Appeals for the Tenth Circuit in *Morgan v. Willingham,* 424 F. 2d 200 (10th Cir. 1970) reversed the granting of summary judgment for the governmental officials because they had not shown by detailed affidavits that they were acting within the scope of their powers—the test for the application of the official immunity doctrine.

Thus, since the Court of Appeals applied the wrong test in this case, this Court should grant certiorari to correct the error and more clearly define the test to be applied in determining the privilege of defamation in official conduct cases.

II. THE DECISION BELOW CONFLICTS WITH THE ANALYSIS IN A DECISION OF THE COURT OF CLAIMS

It is submitted that there is at least a triable question of fact whether the April 1, 1968, document containing the defamatory matter was a personal communication, as petitioner contends, or the initiation of a grievance under NASA procedures, as the respondent, at times, contends. For in notifying petitioner that ". . . Ames management was not involved with authorizing or sanctioning [respondent's] letter

to [petitioner] dated April 1. This is [respondent's] prerogative."—H. Julian Allen, the Director of the NASA-Ames Research Center, raises at least a factual question whether the defamatory communication was a personal and not official document.

Even assuming, *arguendo,* that the document was a grievance petition, under the analysis of the Court of Claims in *Swaaley v. United States,* 376 F. 2d 857 (Ct. Claims 1967) the grievance petition, being an intra-agency petition that may be brought as a privilege of a governmental employee, and not as part of his official duty, would be subject only to a qualified privilege which could be defeated by a show of malice.

Although *Swaaley* was cited to the Court of Appeals, the Court ignored it in its decision. Yet, the analysis in *Swaaley,* though on a different issue, clearly conflicts with the analysis of the Court of Appeals here. Certainly, in the light of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), this Court should determine specifically whether a federal employee is to be entitled to a broader privilege in defamation cases than newspapers.

Thus, since the issue of malice is involved, this Court should not countenance the denial of cross-examination through the granting of summary judgment, see *Santos v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 628-29 (1944), and should rule that summary judgment is inappropriate since intent and motive are critical. Cf. *White Motor Co. v. United States,* 372 U.S. 253, 259-60 (1963); *Pollier v. Columbia Broadcasting System,* 368 U.S. 464 (1962).

III. THE DECISION BELOW CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS

The courts below apparently granted summary judgment primarily on the basis of the essentially conclusory affidavit of John F. Parsons, Associate Director of Ames, which could well have been punctured, had petitioner been afforded the right of cross-examination or pre-trial discovery. Yet, in *Morgan v. Willingham,* 424 F.2d 200 (10th Cir. 1970) the Court held that conclusory affidavits that the governmental officials were performing their official duties were insufficient to satisfy the requirements of Rule 56, Federal Rules of Civil Procedure.

It is submitted that this Court should establish the requirements for factual allegations in affidavits in support of motions for summary judgment in official immunity cases.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, San Francisco, California,
October 22, 1971.

Respectfully submitted,
DAVID B. GOLD,
HERBERT W. YANOWITZ,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 23,536

Laurence Frommhagen,
Plaintiff-Appellant,
vs.
Henry Glazer, et al.,
Defendants-Appellees.

[April 27, 1971]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, DUNIWAY and ELY, Circuit Judges

DUNIWAY, Circuit Judge:

In this libel action, removed to the district court under 28 U.S.C. §§ 1441(a), 1442(a)(1), plaintiff Frommhagen appeals from a summary judgment against him. We affirm.

The affidavits and exhibits on file reveal the following uncontradicted facts.

Frommhagen and Glazer were employed by the National Aeronautics and Space Administration (NASA), an agency of the United States Government, Glazer as Chief Counsel of the Ames Research Center (Ames) of NASA, at Moffett Field, California, and Frommhagen as a scientist at Ames. Frommhagen was not in Glazer's line of supervision.

Pursuant to the Civil Service Commission's *Federal Personnel Manual,* Chap. 771, Subchap. 1 (Inst. 92, July 21, 1967), and the NASA Supplement to that *Manual,* Ames established a grievance procedure for its employees. Ames Management Manual, AMM 3771-1 (May 17, 1965). During January 1968 hearings were held under that procedure on grievances filed by Frommhagen against Glazer and four other senior officials of Ames. Glazer testified under oath at the hearings. On March 22, 1968, Frommhagen sent a letter to Paul Dembling, General Counsel of NASA, in Washington, D.C., in which Frommhagen commented adversely upon Glazer's actions with respect to the grievance proceedings. Glazer read that letter as accusing him of perjury and therefore as defamatory, and on March 28, 1968, he sent Frommhagen an inter-office memorandum demanding a retraction. In a return memorandum sent the following day, Frommhagen declined to retract. Frommhagen sent copies of his memorandum to three NASA officials senior to Glazer, including Dembling.

On April 1, 1968, Glazer responded with the following memorandum:

"NASA-Ames
Moffett Field, California
April 1, 1968

MEMORANDUM to Dr. Laurence H. Fromm-
hagen
Senior Scientist
Life Detection Systems
Branch

From: Mr. J. Henry Glazer
Chief Counsel

Subject: Defamation

You have libeled me before the General Counsel of NASA, the ARC Associate Director, the ARC Assistant Director for Administration and possibly others as a result of the reckless statements made in your memoranda of March 22nd and March 29th. You were given an opportunity—more in the nature of a 'sporting chance'—to retract your libelous statements, but I can only gather from the responses in your memorandum of 29 March that you are either too arrogant or too stupid to really understand what you have done. By copy of this memorandum (with attachments) to the Chief of the ARC Personnel Division I am formally charging you with libeling me before senior NASA officials, and registering a request that appropriate disciplinary action be taken against you consonant with agency procedures.

Hopefully you will spare me from further memoranda even though they have been a source of unbridled enjoyment in my office. But in the face of the Vietnam War, the attack upon the

> dollar, the riots in the cities, and the NASA budget cuts, it is simply immoral, in this time of crises Dr. Frommhagen, for any civil servant to sit idly at his desk and unduly amuse himself by unraveling the leitmotif surrounding a certain ego-centered hero who appears, and re-appears, in your writings. I am truly sorry for you and sorry that, *after much provocation,* you have forced me to institute disciplinary proceedings against you.
>
> JHG:caw"

A copy was sent to Miss M. Helen Davies, Chief of the Ames Personnel Division. Blind copies were sent to the recipients of Frommhagen's earlier memoranda (including Dembling). No other persons received copies. It is immaterial whether this be considered an inter-office memorandum or, as Frommhagen argues, a "personal letter."

On April 10, 1968, Glazer sent a lengthy memorandum to Miss Davies formally invoking the Ames grievance procedure against Frommhagen. A NASA Regulation, entitled "Table of Disciplinary Offenses and Penalties for Employees in the National Aeronautics & Space Administration," provides penalties for numerous offenses, including: "14. Making false or unfounded statements which are slanderous or defamatory about other employees or officials."

Frommhagen's action for libel was based entirely upon Glazer's memorandum of April 1, 1968. In an affidavit, John F. Parsons, Associate Director of Ames and immediate supervisor of Glazer, stated:

"That incident to the performance of his duties as Chief Counsel of the NASA-Ames Research Center, [Glazer] was acting wholly within the scope of his federal employment, and fully within the exercise of his prerogatives, to send or cause to be sent the said April 1st inter-office memorandum to [Frommhagen] and to circulate copies of the same, on federal premises, to [me] and to those NASA officials [to whom he sent copies] as well as to any other NASA official.

"That notwithstanding the federal office which he holds as Chief Counsel of the NASA-Ames Research Center, [Glazer] merely by virtue of federal employment with NASA was authorized to send or cause to be sent without recourse to, or approval from, any NASA official the April 1st inter-office memorandum under the circumstances described since the same constitutes a request, or petition, to the management of the NASA-Ames Research Center to institute agency disciplinary action against [Frommhagen] for alleged misconduct in libeling [Glazer] in official communications with principal officers of NASA, and that any employee of the NASA-Ames Research Center may so petition the management of the Center."

The district judge found that Glazer acted under color of federal office in writing and circulating the memorandum, and that Glazer was therefore immune from personal liability for those acts. In this, the court was right. *Barr v. Matteo,* 1959, 360 U.S. 564. The principal significant difference between this case and *Barr v. Matteo* is that there the alleged libel was

in an agency press release, whereas here Glazer's memorandum was sent only to persons within the agency, and each of them was a person to whom it was proper for him to send it. Thus this is a stronger case for immunity than *Barr v. Matteo.* See dissenting opinion of Chief Justice Warren, 360 U.S. at 583-84. See also *Howard v. Lyons,* 1959, 360 U.S. 593. *See Preble v. Johnson,* 10 Cir., 1960, 275 F.2d 275, 277-79; *cf. West v. Garrett,* 5 Cir., 1968, 392 F.2d 543, 544.

Affirmed.

In the United States District Court
for the Northern District of California

Civil Action No. 49328

Laurence H. Frommhagen,
Plaintiff,

v.

J. Henry Glazer and First Doe
to Tenth Doe, inclusive,
Defendants.

ORDER AND SUMMARY JUDGMENT

This cause having regularly come on for hearing before the Court on the motion of the defendant, J. Henry Glazer, for summary judgment in his favor and against the plaintiff in this cause; and

Due notice having been given to the attorneys for the plaintiff, and the Court being fully advised in the premises, and the matter having been submitted to the Court for decision; and

The Court having considered the motion, reasons and authorities, supporting affidavits, and having found that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law,

It is hereby ordered that:

1. The motion of the defendant, J. Henry Glazer, be and it is hereby granted for the reasons stated therein; and

2. Summary judgment in favor of the defendant, J. Hanry Glazer, against the plaintiff, Laurence H. Frommhagen, be and it is granted and shall be entered accordingly.

Dated: Sept. 9, 1968.

Lloyd H. Burke,
United States District Judge

Filed September 9, 1968,
James P. Welsh, Clerk.

In the United States District Court
for the Northern District of California

Civil Action No. 49328

Laurence H. Frommhagen, Plaintiff,
v.
J. Henry Glazer and First Doe to Tenth Doe, inclusive, Defendants.

JUDGMENT

This cause came regularly on for hearing before the Court on September 9, 1968, upon the motion of the defendant, J. Henry Glazer, for Summary Judgment; the Honorable Lloyd H. Burke, Judge presiding. The cause was argued by Bryan Jones of Jones, Leinwohl and Burriss, attorneys for the plaintiff, Laurence H. Frommhagen, and by Sheldon Deutsch, Assistant United States Attorney, for Cecil F. Poole, United States Attorney and submitted to the Court for its decision. The Court granted the motion of the defendant, J. Henry Glazer, and dismissed the action as to him, and ordered Summary Judgment in his favor against the plaintiff, which order of September 9, 1968, is made a part hereof.

It is hereby ordered, adjudged and decreed that the plaintiff take nothing by his alleged cause of action

and that Judgment be entered for the defendant, J. Henry Glazer, and against the plaintiff.

Dated this 11th day of Oct., 1968.

Lloyd H. Burke
United States District Judge

Approved as to form:
Jones, Leinwohl, & Burriss
By: Bryan Jones
Attorneys for Plaintiff

Filed October 14, 1968,
James P. Welsh, Clerk.